

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WARREN DURHAM, JR.,) Docket No. 04 – 198 E
)
Plaintiff) Electronically filed pleading
)
vs.) (Judge Sean J. McLaughlin)
)
CITY and COUNTY OF ERIE; ERIE) Reply to Plaintiff's Objections to Magistrate
COUNTY COURT; SHAD CONNELLY,) Judge's Report and Recommendation Filed on
in his capacity as judge; FRED P.) Behalf of Kevin Kallenbach and County of Erie
ANTHONY, in his capacity as judge;)
KEVIN KALLENBACH, individually, in) Filed on behalf of: Defendants,
his capacity as public defender,) Kevin Kallenbach and
) The County of Erie
Defendants)
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**REPLY TO PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND
RECOMMENDATION FILED ON BEHALF OF KEVIN KALLENBACH AND
COUNTY OF ERIE**

In reply to Mr. Durham's objections, filed August 9, 2005, Kevin Kallenbach and the County of Erie (the "County Defendants") rely upon the reasoning set forth in their brief in support of the Motion to Dismiss and their reply in support of the Motion to Dismiss.

However, the County Defendants will respond briefly to Mr. Durham's objection concerning his allegations of conspiracy between Mr. Kallenbach and state officials. Mr. Durham points to a 1984 decision by the Supreme Court, Tower v. Glover, 467 U.S. 914, 104 S.Ct. 2820 (1984), in which the court affirmed the Ninth Circuit Court of Appeals' determination

that a public defender is not entitled to immunity and may be liable under Section 1983 if there is an allegation that the public defender engaged in a conspiracy with state officials. The court did not list what specific allegations were made by the plaintiff in that case, but merely found that, because the plaintiff had alleged conspiracy in his complaint and because there was no immunity, the Section 1983 action against the private actor should be permitted to move forward. *Id.* at 917-920.

The County Defendants do not argue that Mr. Kallenbach is immune from a Section 1983 action and indeed agree that a public defender may be liable under Section 1983 if there are *specific* allegations of conspiratorial conduct on the part of the public defender with state actors. See Rauser v. Glazier, 1994 WL 418988, at *2 (E.D. Pa. 1994) ("Allegations must be particularly specific where conspiracy is alleged so that purely private action may not be converted into state action"); Hammond v. Creative Financial Planning Organization, Inc., 800 F. Supp. 1244, 1250 (E.D. Pa. 1992) (when actions of judge are supplying the state action element, allegations of conspiracy must be "especially specific" in order to ensure that private actions are not wrongfully converted into state action).

In fact, Mr. Durham has agreed that a "section 1983 complaint must set forth with specificity the conduct of defendant alleged to have harmed the plaintiff" and that "[a]llegations must be particularly specific where conspiracy is alleged so that purely private action may not be converted into state action merely by inclusion of a state official as a defendant in the action." Memorandum of Law in Support of Plaintiff's Response to Motion to Dismiss at 2.

Therefore, the holding in Tower v. Glover does not change or impact the well-reasoned report and recommendation of the Magistrate Judge in this case.

For the above reasons and for the additional reasons set forth in the brief in support of the Motion to Dismiss and the reply in support of the Motion to Dismiss, the County Defendants respectfully request that the Report and Recommendation of the Magistrate Judge be adopted and this case be dismissed.

Respectfully submitted,

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BY: s/ Tracey D. Bowes

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Plaintiff)
) Civil Action No. 04 – 198 E
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CITY and COUNTY OF ERIE; ERIE)
COUNTY COURT; SHAD CONNELLY,)
in his capacity as judge; FRED P.)
ANTHONY, in his capacity as judge;)
KEVIN KALLENBACH, individually, in)
his capacity as public defender,)
)
Defendants)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of August, 2005, a copy of the
within document was served on all counsel of record and unrepresented parties in accordance
with the applicable rules of court.

s/ Tracey D. Bowes
Tracey D. Bowes

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